mine the arrangement of grade structures in all the combined schools[1] and was permitted to order alterations and adjustments in its discretion to the extent that such changes would not diminish the degree of desegregation projected by the court of appeals' decision. Concluding its order, the court of appeals indicated:

> It is axiomatic, of course, that the school board and the district court are under a continuing duty to appraise the school system in light of the actual conditions and experience and, within limits we have just indicated, to make whatever changes are necessary, now and in the future, to assure the continued maintenance of a unitary system. (Petition App. 44a).

Upon remand, after hearing arguments from both parties and receiving recommendations from the board, the district court on August 28, 1970, ordered implemented the pairing and clusterings in the two school attendance areas specifically required by the court of appeals, selected the plan it regarded as most feasible for the third attendance area out of the six recommended by the appellate court, and designated how grades would be assigned among the paired and grouped schools. Subsequently, on September 4, 1970, the district court postponed until November 15, 1970 full implementation of the court of appeals order requiring pairing and clustering. Until that date, the board was permitted to operate according to the desegregation plan originally ordered by the district court which had been reversed on appeal. Several petitions of the board to the Fifth Circuit for rehearing, rehearing *en banc*, a stay order

[1] The court of appeals recommended that grades in the combined school not be "split", i.e., assigning a particular grade to more than one school in the group, but allowed "splitting" where the degree of desegregation in any attendance zone was not diminished. (Petition App. 43a).

and recall of the mandate were denied by the court of appeals. However, on November 2, 1970, that court stayed the order of the district court of September 4, 1970 "until further orders of this court" and took the board's most recent supplemental petition under advisement. As a consequence, the Broward County school system continues to operate in accordance with the original geographic zoning plan approved by the district court rather than with that involving pairings and clusterings required by the Fifth Circuit.

No. 891

The first hearing in the district court on the complaint seeking desegregation of the dual school system in Broward County was held in January 16, 1970. One month later, on February 16, 1970, the board (petitioners in No. 479, respondents in No. 891) submitted a proposed plan of desegregation to the district court which contained, among other provisions, a statement of the intention to close ("phase-out") the Blanche Ely High School, located in Pompano Beach, Florida. A hearing on the board's plan was held on March 3, 1970 at which time an attorney indicated to the court that he represented the Blanche Ely Parent Teachers Association (petitioners here), a group that opposed the closing of Ely High School, and intended to seek intervention in the desegregation litigation to protect that group's interests. No appearance of counsel nor petition for leave to intervene was filed on behalf of Blanche Ely Parents between March 3 and April 3, 1970. Final hearing in this matter was held in the lower court on April 3, 1970. At that hearing, a second attorney appeared, stated that he represented the Blanche Ely Parent Teachers Association and requested leave of the court to intervene. Leave was granted on April 7, 1970. On April 13, 1970 the second attorney filed his notice of appearance and a petition for leave to inter-

vene. In support of its opposition to the closing of Blanche Ely High School, the Parent Teachers Association appended to its petition documents indicating that Ely was a duly accredited facility, resolutions from community groups in Pompano Beach and telegrams from citizens opposing the closing of Ely. In its final order of April 30, 1970, the district court approved the board's plan to close Ely finding "that it [Ely] was not a reasonably good high school facility, being deficient in every area, excepting physical education." [Petition App. 14a, No. 749]. In addition to having the board's recommendations on Ely, the district court also had before it findings of an expert in educational facilities and specifications hired by H.E.W. which concluded that Ely was an inferior high school plant. In accordance with the board's request, the district court ordered the Ely facility used in 1970-71 to house students from an all-black elementary school that was being closed. On May 11, 1970, the Ely Parent Teachers Association moved for "a new trial and a full trial." The district court denied that motion on June 4, 1970, reiterating its grounds for allowing Ely to be closed (reports of independent experts as to its inadequacy) and its reasons for rejecting the arguments of the Ely Parent Teachers Association (inconclusiveness of accreditation ratings and lack of probative value of the resolutions and telegrams).

The Ely Parent Teachers Association filed a cross-appeal, after plaintiffs appealed seeking review of the lower court's order respecting desegregation of the 13 all-black elementary schools in Broward County. As cross-appellant, it sought reversal of the decision to close Ely High School and argued, along with plaintiffs, that the over-all plan approved by the district court was constitutionally inadequate. In support of its position, the Parent Teachers Association submitted two documents, a certificate of accreditation given

Ely by the Southern Association of Colleges and Schools and an evaluation done of Ely by the same Association in April, 1967. The court of appeals affirmed the closing of Ely stating:

> We are not persuaded that we should order the district court to require the reopening of Blanche Ely as a high school. There is nothing in the record to indicate that the Board's decision to close Blanche Ely was based on anything other than sound educational criteria. Moreover, the record amply supports the district court's finding that the Blanche Ely facility is not an adequate physical facility for conducting a high school program. In the light of these factors, we find no merit in the intervenors' objection to the closing of the school. (Petitioners App. 36a-37a, No. 749).

ARGUMENT

I.

The two issues raised by the board's petition are controlled by previous decisions of ths Court. There are no other issues presented to warrant granting a writ of certiorari. The board's first argument contends that the order of the court of appeals which requires the pairing and grouping of some, but not all, schools in Broward County to desegregate the dual system works a denial of equal protection upon those students attending the paired and grouped schools. The concept of equal protection, embodied in both the 5th and Fourteenth Amendments, forbids state or federal government to establish arbitrary, irrational distinctions among classes of persons. If distinctions are made by a governmental entity which works a hardship upon one or more classes as compared to others, such distinctions

must be justified in terms of being reasonably related to a legitimate governmental purpose. *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

With respect to the problem of segregated public education, this Court, since *Brown* v. *Board of Education,* 347 U.S. 483 (1954), has put states and all courts, state and federal, on notice that dual school systems of black and white schools must be dismantled "root and branch" and unitary, non-racial systems established in order to comply with the Constitution. In *Green* v. *County School Board,* 391 U.S. 430 (1968) this Court required school boards to present, and federal courts to demand, desegregation plans which offered meaningful prospects of achieving immediate and complete disestablishment of dual school systems. What the board challenges in this case is the fact that the court below fulfilled its responsibility under *Brown, supra* to desegregate totally the school system in Broward County. The simple answer is that whatever distinctions were made by the court between classes of school children were justified because they were intimately related to a legitimate constitutional purpose, — desegregation of the school system. Some schools were involved in the desegregation process more than others because of their proximity to schools of heavy black concentration. Nothing in the Fourteenth Amendment warrants denominating this desegregation process as a denial of equal protection. And in any event, if petitioners' analysis were adopted, it could be argued that school boards have traditionally discriminated against various classes of school children by assigning some, but not all, to K-6 schools, some to K-3 schools, some to new schools, some to old schools, some to schools with specialized teaching staffs and equipment, *ad infinitum.* It is difficult to see the constitutional distinction between

assigning children to schools of differing grade levels to achieve desegregation and such assignments as a consequence of normal school administrative procedures.

The board further contends that the court of appeals order denied due process under the Constitution. This argument has no more merit than the first. As the record in this case reflects, the district court received extensive information from not only the board, but also from H.E.W. experts and private plaintiffs with respect to desegregating the Broward County school system. In its final order, the district court rejected the H.E.W. recommendations for pairing and grouping the all-black elementary schools with nearly predominantly white schools because it did not favor the use of such techniques, not because they were infeasible or unworkable. In so doing, the court acted in conflict with this Court's holdings in *Green, supra.* The court of appeals, armed with extensive information on pairing and clustering and the fact of the lower court's error of law, was able to devise an effective desegregation plan relating solely to elementary schools. The other areas of concern which the district court evaluated and ruled on in accordance with *Green, supra,* were left untouched by the appellate court. And, as indicated above, crucial decisions on the arrangement of grade structures in the paired and grouped schools, which set of pairings and groupings would be appropriate for the last of three attendance areas (out of a list of six alternatives) and the extent to which the court of appeals plan should be modified or altered in the future were all left to the discretion of the district court on remand, based upon its experience, familiarity with local conditions, and ability to consult with board officials. According to this Court's strict instructions in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970) dual

school systems were to be ended immediately, not later than February, 1970 in the *Carter* cases. The court of appeals in this case made an exemplary attempt to meet its constitutional responsibility, while at the same time permitting board officials and the district court to make whatever alterations were necessary in the desegregation plan without reducing the degree of disestablishment of the dual system its order achieved. Its action was in complete accord with the requirements of procedural due process. Insofar as petitioners in No. 749 seek review of the questions of racial balance and busing which they contend are raised by this record, this Court presently has before it two cases, *Swann* v. *Charlotte-Mecklenburg Board of Education,* Nos. 281 and 349, this Term, and *Davis* v. *Board of School Commissioners of Mobile County,* No. 436, this term, in which those issues have already been extensively briefed and argued. To the extent that decisions in those cases may affect the issues decided in this case, appropriate motions for supplemental relief or modification may be presented to the courts below.

II.

Petitioners in No. 891 present equal protection and due process arguments as well to support the contention that the lower courts erred in allowing Ely High School to be closed. On the matter of denial of equal protection, the Ely Parent Teachers Association has not presented evidence in any court that refutes the determination made by the board and an outside educational expert that Ely High School was an inadequate, inferior secondary school facility. Documents indicating Ely's accreditation and a three-year-old evaluation of its facilities established nothing with respect to the physical conditions at the high school. The record, therefore, reflects a sufficient educational, non-racial basis for the district court's decision to close Ely. Furthermore,

by closing Ely, the district court thereby increased the degree of desegregation in surrounding, physically superior high school facilities, which it was required to do under *Brown, supra* and *Green, supra.* With respect to the contention that the district court denied the Ely Parent Teachers Association due process of law, the record is also dispositive. First, the Association procrastinated an entire month, from March 3 to April 3, 1970, before actually filing a petition to intervene. April 3 was, of course, the date scheduled for final hearing in this matter. Second, the Association's evidence in support of its opposition to the closing of Ely was then and has always been documentary. That the district court refused to allow the Association to put on testimony in support of inconclusive documentary evidence cannot be regarded as a denial of due process. Finally, it is evident, especially in the petition itself (page 13) that what the Association seeks is the continuation of Ely High School at any cost, irrespective of whether the facility is desegregated, predominantly black or even all-black. The decisions of this Court precluded the district court and court of appeals from agreeing to the demands of the Association to keep Ely open even as an all-black facility.

Certainly the issue of black school closings as a consequence of the desegregation process presents constitutional questions, which on a record quite different from the one in this case, may have to be considered by this Court. See *Haney* v. *County Board of Education of Sevier County,* 429 F.2d 364 (8th Cir., 1970). Here, nothing in the record indicates that the court below or the district court acted arbitrarily or discriminatorily in ordering the closing of Ely High School.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 749 and 891 for writs of certiorari should be denied.

Respectfully submitted,

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